

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHAWN SMITH

Claimant

VS.

HORIZON CABLE SERVICE, INC.

Respondent

AND

COMMERCE & INDUSTRY INS. CO.

Insurance Carrier

Docket No. **1,041,931**

ORDER

Respondent and its insurance carrier request review of the February 9, 2009 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment and that he provided timely notice.

Respondent requests review of whether claimant met with personal injury arising out of and in the course of employment and whether claimant gave timely notice of his injury. Respondent argues claimant is not credible as he initially stated his accident occurred on a date a month after his employment was terminated. Respondent further argues that claimant did not provide timely notice as both his supervisor and respondent's manager denied being told by claimant that he had been injured. Consequently, respondent requests the Board to reverse the ALJ's Order for Medical Treatment and deny the claim.

Claimant argues the ALJ's Order for Medical Treatment should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

This is an appeal from the second preliminary hearing held in this claim. After the first preliminary hearing held on November 7, 2008, the ALJ found claimant provided respondent with timely notice of accidental injury but denied claimant's request for medical treatment, temporary total disability compensation and payment of outstanding medical bills. The ALJ determined claimant failed to meet his burden of proof that he was entitled to any of the requested benefits. The ALJ's November 7, 2008 Order was not appealed.

At the second preliminary hearing held on February 6, 2009, claimant again requested medical treatment and the payment of unauthorized medical. Respondent again denied that claimant's accidental injury arose out of and in the course of his employment or that he provided respondent with timely notice of accident. No additional testimony was taken, instead the parties agreed that the transcript of the preliminary hearing held on November 7, 2008, should be considered as part of the evidentiary record. Claimant also submitted additional medical records as part of the evidentiary record. Respondent did not object to the offered exhibits.

At the November 7, 2008, preliminary hearing the claimant testified that on May 16, 2008, as he was unwinding cable from a spool his hand got caught in the cable and his glove was pulled off. Claimant injured his thumb. Claimant testified that he told his supervisor that he had hurt his hand. Claimant testified that he put his glove back on and his supervisor came over and taped his glove to his hand and told him to "cowboy up". Claimant further testified that he also told respondent's vice-president he had been injured at work when he was terminated.

Claimant further testified that his accident occurred two days before he was terminated from his employment with respondent. It was later established that claimant was terminated on April 10, 2008. Consequently, his accident occurred on April 8, 2008, and not May 16, 2008.¹

Claimant did not seek medical treatment until June 16, 2008, when his hand became swollen and his thumb would not bend. Claimant further testified that as the days and weeks went by his hand worsened. He finally sought medical treatment with Mexican Ministry Health Clinic and testified he told them about the injury. Although the medical record of that visit contained a notation "denies injury" it also indicated "was laid off work because of injury."²

¹ Although claimant provided an incorrect accident date, his testimony was consistent that the accident occurred two days before he was terminated.

² P.H. Trans. (Nov. 7, 2008), Cl. Ex. 2.

Floyd Dudley, respondent's vice president and manager, testified at the November 7, 2008 preliminary hearing. Mr. Dudley testified that claimant was hired on February 25, 2008, and was placed on a 90-day probationary period. He further testified that claimant did not get along with the co-worker where he was first assigned to work so he was reassigned to the job on the spooling truck. On April 8, 2008, when claimant and his supervisor, Chris Evans, returned to the shop there was a heated argument between the two and Mr. Dudley intervened and sent claimant home to cool off for a couple of days. He then terminated claimant on April 10, 2008, because he could not get along with his co-workers. And Mr. Dudley denied claimant ever told him he had injured his thumb in an accident at work.

Chris Evans, the operator of the spooling truck, testified that he got into an argument with claimant and that claimant threw a hammer into the truck. Mr. Evans could not remember an incident where claimant had injured his right thumb. And although Mr. Evans denied taping claimant's glove to his skin he did agree that he taped claimant's glove because it had ripped. And that claimant had the glove on his hand when he taped it.

Dr. Michael J. Baughman examined and evaluated claimant on November 13, 2008. Upon physical examination, the doctor found characteristics of a stenosing tenosynovitis of the flexor pollicis longus tendon over the A-1 pulley of the right thumb with enlargement or a nodule over the pulley. Dr. Baughman recommended a right trigger thumb release.

Dr. Michael J. Baughman's office note dated November 13, 2008, indicated the following:

The patient indicates that he was well until 16 May 2008. On or about that date he states that he caught his thumb in a "sand line cable" for an oil rig. He's been under the care of practitioners elsewhere without significant improvement in his thumb pain despite months of conservative management.³

In a letter dated December 3, 2008, Dr. Baughman opined that "absent documentation of a preexisting medical treatment for stenosing tenosynovitis of the right thumb, one must take in good faith that his current trigger thumb, or stenosing tenosynovitis of the right thumb flexor pollicis longus tendon, is the result of his work related event."⁴

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

³ P.H. Trans. (Feb. 6, 2009), Cl. Ex. 1.

⁴ *Id.*, Cl. Ex. 3.

right depends.⁵ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁶

The respondent defended this claim by attacking claimant’s credibility. The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent’s representatives testify in person. In granting claimant’s request for medical treatment the ALJ apparently believed claimant’s testimony over the respondent’s representatives. The Board concludes that some deference may be given to the ALJ’s findings and conclusions because she was able to judge the witnesses’ credibility by personally observing them testify.

Although the claimant initially provided an incorrect accident date, he nonetheless consistently testified that the accident occurred two days before he was terminated from his employment with respondent. Claimant testified he told Mr. Evans that he had been injured and Mr. Evans responded by taping his glove to his hand. Mr. Evans denied he was told about an injury but did admit to taping claimant’s glove while it was on his hand. This Board Member affirms the ALJ’s finding that claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and provided respondent timely notice of that accidental injury when he told Mr. Evans that he had hurt his hand.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that the Order for Medical Treatment of Administrative Law Judge Pamela J. Fuller dated February 9, 2009, is affirmed.

IT IS SO ORDERED.

⁵ K.S.A. 44-501(a).

⁶ K.S.A. 44-508(g).

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2008 Supp. 44-555c(k).

SHAWN SMITH

DOCKET NO. 1,041,931

Dated this _____ day of April 2009.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Grant Shellenberger, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge